HASSNAR HJ MP EBRAHIM

v.

IBRAHIM MOHAMAD & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CIVIL SUIT NO: S22-10 OF 1998]
3 MARCH 1999

POLICE: *Investigation - Police report - Whether investigations on a report lodged is a statutory duty or discretionary statutory power - Whether some form of action must be taken by police upon a report being lodged - Criminal Procedure Code, ss. 107, 108, 109 & 110*

PUBLIC SERVANTS: *Civil proceedings - Breach of statutory duty - What ought to be shown to establish civil liability*

CIVIL PROCEDURE: *Striking out - Principles applicable - Reasonable cause of action - What amounts to reasonable cause of action - Approach court ought to adopt - Rules of the High Court 1980, O. 18 r. 19*

The plaintiff instituted a civil suit against the defendants alleging that the police had failed in their duty resulting in him suffering loss and damage. The plaintiff contended that the police failed to take any action on the numerous police reports lodged by him or others connected to him.

This was the first four defendants' application to strike out the plaintiff's suit on the ground, *inter alia*, that no reasonable cause of action was disclosed. This was primarily based on their contention that investigation on police reports lodged is a matter for the police to decide after weighing the circumstances of each case and that it was not for the plaintiff to choose the manner in which the police should exercise their discretion. Further, they assert that a decision not to investigate any further is a proper exercise of discretionary power and according to law.

In opposing the defendants' application, the plaintiff submitted that pursuant to ss. 108 and 110 of the Criminal Procedure Code, the police are bound to investigate reports lodged and possesses no absolute discretion to ignore such reports. The plaintiff further submitted that the manner in which the police should exercise their discretion was not being questioned. Rather, the complaint was one of non-exercise of discretion.

Held:

[1] It is only in plain and obvious cases that the power to strike out under O. 18 r. 19 of the Rules of the High Court 1980 should be exercised.

[2] The question of whether the conduct of the police as alleged, and if indeed true, is actionable in law depends on whether there is in fact a statutory duty or only a discretionary statutory power upon the police to conduct investigations on any report lodged. If it is the former, then an action will lie as where a statute confers power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie. If it is the latter, then the element of malicious refusal must be alleged and proved in order to succeed for compensation.

[3] Sections 107 to 110 of the Criminal Procedure Code indicate that the police have a role to play in the event information pertaining to a crime is lodged. For a non-seizable offence the police is expected to refer the matter to a magistrate or obtain an order from the public prosecutor before commencing an investigation.

[4] The defendants did not aver in any manner that the police did take some form of action in compliance with the Criminal Procedure Code. Neither is there any indication that steps have been taken as regards the police reports referred to by the plaintiff. Based on the allegations of the plaintiff, which for the purpose of this application may be assumed as true, it cannot be said that there is no cause of action disclosed. The provisions of the law expect some form of action to be taken by the police when a report is lodged. Even if a decision is made not to launch an investigation, the least the police are expected to do is to say so and to give reasons for so deciding. In this case there was no assertion from the police to that effect.

Per curiam:

[1] To establish civil liability for a breach of statutory duty, it is necessary for a plaintiff to show that (a) the injury he has suffered is within the ambit of the statute; (b) the statutory duty imposes a liability to civil action; (c) the statutory duty was not fulfilled; and (d) the breach of duty has caused his injury.

[Application dismissed.]

Case(s) referred to:
Drummond-Jackson v. British Medical Association [1970] 1 All ER 1094 ***(aff)***
Hill v. Constable of West Yorkshire [1988] 2 All ER 238 ***(cit)***
Hu Sepang v. Keong On Eng & Ors [1991] 2 CLJ 999 ***(aff)***
Lee Nyan Choi v. Voon Noon [1979] 2 MLJ 28 ***(aff)***
Mooney & Ors v. Peat, Marwick, Michell & Company & Anor [1967] 1 MLJ 87 ***(aff)***

Legislation referred to:
Criminal Procedure Code, ss. 108, 110
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Ansari Abdullah; M/s Ansari & Co
For the defendants - Nur Aini Zulkiflee SFC

Reported by S Dharmendran

JUDGMENT

Richard Malanjum J:

The Application

By way of summons in chambers dated 2 October 1998 (encl. 24) the first, second, third and fourth defendants (collectively called "the defendants") apply for the following Orders, namely, that:

(a) there is no reasonable cause of action disclosed against the First, Second, Third, and Fourth Defendants under Order 18 Rule 19 Rules of the High Court 1980;

(b) the action against the First, Second, Third, and Fourth Defendants is frivolous and vexatious under the said Order 18 Rule 19;

(c) the action against the First, Second, Third and Fourth Defendants is an abuse of the process of the Court under the said Order 18 Rule 19;

(d) the present civil suit against the First, Second, Third, and Fourth Defendants be struck out with costs;

(e) all other proceedings be stayed pending the outcome of this application; and

(f) such other consequential relief that this Honourable Court deems fit.

The application is supported by an affidavit affirmed on 1 October 1998 of Puan Nur Aini bte Zulkiflee, ("Nur Aini's affidavit") the Senior Federal Counsel, Attorney General's Chambers, Kota Kinabalu, Sabah.

The plaintiff is opposing the application and has therefore filed an affidavit in reply affirmed on 20 October 1998 ("Hassanar's affidavit") (encl. 29).

The Claim Of The Plaintiff

In his statement of claim the plaintiff prays for the following relief:

a. A declaration that the 1st Defendant had acted negligently and/or arbitrarily and/or *mala fide* in refusing to take action on all the reports lodged either by the Plaintiff or his donors thus obstructing the Plaintiff from obtaining justice;

b. A declaration that the action by the 2nd, 3rd, 4th and 5th Defendants in ejecting all the newly engaged labourers on the 6th day of May as unlawful and/or *mala fide* and are against the Variation Order granted on the 30th October 1996, the Injunction Order granted on the 12th March 1997 and the Land Ordinance of Sabah (Cap 68).

c. A declaration that the 2nd, 3rd 4th and 5th Defendants had acted against the Penal code in assisting a trespasser to deprive the ownership of a registered property and acted unconstitutionally in assisting Encik Lim Si Cheong and or his servants, agent or Solicitors to eject the labourers from NT 083021667 (Lot One) registered under the name of En. Roslan B Hussin;

d. A declaration that the 1st, 2nd, 3rd, 4th and 5th Defendants as Police Officers had acted against the Police Act, the Penal Code and *mala fide* in refusing to take action against Encik Lim Si Cheong for making false statement under oath, and perjury to the Honourable Court although a report had officially been lodged thus prolonging injustice to the Plaintiff;

e. A declaration that the 1st, 2nd, 3rd, 4th and 5th Defendants as Police Officers had acted against the Police Act, the Penal Code and *mala fide* in refusing to take action against Encik Lim Su Kee for making false statement under oath, false Police report and committing perjury to the Honourable Court although numerous Police reports had been lodged thus prolonging injustice to the Plaintiff.

f. A declaration that the action by the 2nd, 3rd, 4th and 5th Defendants arresting and detaining the Plaintiff's labourers on the 6th day of May 1997 was:

i) an abuse of Police Power and/or made *mala fide*;

ii) against the Penal Code;

iii) against the Police Act 1967;

iv) against the Land Ordinance of Sabah (Cap 68);

v) against Order of the High Court, and

vi) against the Federal Constitution of Malaysia.

g. A declaration that the unjustified harassment by the 2nd, 3rd, 4th and 5th Defendants in arresting and detaining the Plaintiff's labourers thereby interfering with the exercise of his constitutional right to property had acted unreasonably and to deprive the Plaintiff of his constitutional right to his property as guaranteed under Article 13 of the Federal Constitution;

h. An order that the 1st, 2nd, 3rd, 4th and the 5th Defendants should be personally liable for all the aforesaid acts that resulted in loss and damages to the Plaintiff.

i. A declaration that the 7th Defendant is vicariously responsible for the acts or omission of the 1st, 2nd, 3rd, 4th, 5th and the 6th Defendants as they were at all times under its employment;

j. An order that the 6th Defendant do direct his subordinates to investigate all the reports made of cheating, theft, forgery and perjury made by the Plaintiff or other landowners who were affected by the fraudulent action of Encik Lim Si Cheong, Encik Lim Su Kee and Encik Tsen Thiam Choi.

k. Damages to be assessed for stress and anxiety caused by the acts or omission of the Defendants;

l. The defendants do pay the cost of this action;

m. Interest on the loss and damages at 8% per annum under section 11 of the Civil Law Act of 1956 from the date of the said act and/or omission until full payment; and

n. Any other relief or orders as the Court deems fit.

In essence, the complaint of the plaintiff is that the police have failed in their duty and he has suffered loss and damage as a result. As to the nature of the failure the plaintiff alleged that the police failed to take any action on the numerous police reports lodged either by the plaintiff or others connected to him. And those reports came about in relation to a dispute the plaintiff has with those persons mentioned in the statement of claim over parcels of land under the Smallholders Scheme in Luang Manis, District of Labuk and Sugut, Sandakan, Sabah.

The plaintiff, alleging cheating and the making of false report on the part of certain people, lodged the first of the series of police reports on 16 February 1995. Subsequently, on 30 August 1995 Nandong Hussin lodged his report under police report No. 351/95 against one Lim Si Cheong for forgery and perjury.

Roslan Hussin lodged the next report on 15 November 1995 under police report No. 531/95 against one Lim Si Cheong and Lim Shu Ying for perjury in connection with an affidavit filed by Lim Si Cheong in a court action. The plaintiff averred that the police had abetted the said Lim Si Cheong in his attempt to obstruct justice.

The other police reports lodged on diverse dates in 1996 and 1997 alleged various offences such as perjury, forgery, theft of various objects such as water tanks and oil palm fruits, police brutality, trespass, lodgment of false police report, destruction of boundary stones, obstruction of justice, misuse of power by one Inspector K. Ramasamy and other Police personnel, the installation of illegal gate and the presence and the engagement of illegal immigrants.

And in claiming compensation for loss and damage suffered the plaintiff particularised the reasons as follows:

(1) willful refusal by the police to take action on the police reports lodged thereby depriving him of his constitutional rights and access to his property;

(2) willful refusal by the police to take action on the police report lodged thereby resulting in the theft of two water tanks and damage to his house;

(3) unjustified harassment and unlawful action by the police resulted in the plaintiff encountering difficulties in getting labourers to work in his land. Consequently, the matured palm fruit trees were neglected;

(4) the action of the police in ejecting and detaining the labourers of the plaintiff made it seem that the plaintiff was involved in criminal activities thereby resulting in his character as a businessman being brought into public scandal, ridicule and contempt; and

(5) the actions or omissions of the police were not made in good faith and in contravention of the public and statutory duty of the police.

The Defendants' Grounds And Contentions

Paragraph 8 of Nur Aini's affidavit reads:

> 8. I verily believe that there is no reasonable cause of action disclosed by the Plaintiff against the First, Second, Third and Fourth Defendants and/or as such this action is frivolous and vexatious and an abuse of the process of Court for the following reasons;
>
> 8.1 that declarations cannot and/or should not be issued by this Honourable Court on the grounds sought by the Plaintiff;
>
> 8.2 that the acts complained of in this case revolves around a land dispute between the Plaintiff and several parties named in the Statement of Claim of which the matter is pending if not already disposed of before this Honourabe Court and is not within the jurisdiction of the First, Second, Third and Fourth Defendants; and
>
> 8.3 that the matters complained of are "non justiciable".

In her submission learned Senior Federal Counsel for the defendants abandoned the issue of 'non justiciable'. And thus she confined her argument on the following points:

(a) that no reasonable cause of action disclosed due to:

(i) failing to meet the test as set out in the case of *Hu Sepang v. Keong On Eng & Ors* [1991] 1 MLJ 440 where his Lordship Lim Beng Choon had this to say at p. 442:

> It has been said that *to establish civil liability for a breach of statutory duty the plaintiff must show that: (a) the injury he has suffered is within the ambit of the statute, (b) the statutory duty imposes a liability to civil action, (c) the statutory duty was not fulfilled, and (d) the breach of duty has caused his injury* – see *Clerk & Lindsell on Torts* (14th Ed) para 1581. I should also bear in mind that a *statute may impose a duty towards persons generally in which case no question can arise of whether the plaintiff is within the class protected.* Furthermore it is also necessary to bear in mind that *where a statute confers power coupled with a* ***duty*** *to exercise it, failure to do so is a breach of that duty for which a remedy will lie.* An interesting case advocating this proposition is the case of *Schacht v. The Queen in Right of the Province of Ontario* [1972] 30

DLR (3d) 641 (folld) to which I shall revert to later in this judgment. On the other hand, *where the loss is occasioned by failure to exercise a power coupled with a* ***discretion*** *there is no liability* – see *Great Central Railway Co v. Hewlett* [1916] 2 AC 511 (folld). *But a plaintiff is still entitled to compensation if he can prove that there had been* ***malicious*** *refusal to exercise a discretionary statutory power.*; (emphasis added)

(ii) investigation on the police reports lodged is a matter for the police to decide after weighing the circumstances of each case. It is not for the plaintiff to choose the manner in which the police should exercise their discretion. After all a "decision not to investigate any further is a proper exercise of discretionary power and according to law."; and

(iii) the allegation of *mala fide* is not founded on any evidence.

(b) The claim is frivolous and vexatious in that the real issue is on title to land, which is not within the purview of the defendants, but with the State Government of Sabah. Further, the allegation on inaction on one police report made on 16 February 1995 is statute-barred as at 16 February 1998 by virtue of s. 2(a) Public Authorities Protection Act 1948.

(c) Grant of Declaratory Order is discretionary and should be confined to legal or equitable rights.

(d) The element of public policy should also be considered, as in this case the real subject of the suit is the manner of the exercise of discretion. To allow it would be against public policy, as it would open the floodgates to litigation. The case of *Hill v. Constable of West Yorkshire* [1988] 2 All ER 238 was cited for the proposition.

(e) The claim is an abuse of process of court. The points raised under para. (a) and (b) hereinabove were relied upon for this ground.

The Plaintiff's Reply

Basically, learned counsel for the plaintiff submitted that the statement of claim discloses allegation of facts. And it is his contention that the police are bound to investigate reports lodged and possesses no absolute discretion to ignore such reports. According to learned counsel to hold otherwise would be contrary to ss. 108 and 110 of the Criminal Procedure Code. But from the submission it also seems to me that learned counsel conceded that there must, in the first place, appear to be sufficient and reasonable grounds for the police to act on the reports lodged.

Learned counsel further submitted that the plaintiff is not questioning the manner in which the police should exercise their discretion. Rather the complaint is one of non-exercise of discretion and the idea of absolute discretion being perceived.

On the issue of *mala fide* learned counsel contended that it should only be considered at the trial stage and not by way of striking out application.

As regards the question of limitation learned counsel argued that the very nature of the act complained of makes it a repetitious and continuing tortious action. And in any event one police report which is time-barred should not affect the whole case.

And finally learned counsel implored that the matter should be given consideration, as the court is the remaining forum for the plaintiff to get redress.

The Law

It is settled law that it is only in plain and obvious case that the power to strike out under O. 18 r. 19 of the Rules of the High Court 1980 (RHC) should be exercised. A litany of cases on this point can be found in our local law journals and I need only to refer to some of them. In the case of *Lee Nyan Choi v. Voon Noon* [1979] 2 MLJ 28 at p. 29 his Lordship Lee Hun Hoe CJ (Borneo) had this to say:

> ... In this particular case triable issues were clearly raised. A perusal of the statement of account filed by respondent shows many controversial items which could only be determined by a proper trial. As there are triable issues the proper course would be for the issues to be tried in the usual manner in open court. *The power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases.* The present case is not one of those plain and obvious cases. (emphasis added). (See also: *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23).

As to what is reasonable cause of action I take guidance from the case of *Drummond-Jackson v. British Medical Association* [1970] 1 All ER 1094 where Lord Pearson at p. 1101 said this:

> A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.

And to strike out a suit on the ground that no reasonable action has been disclosed requires certain consideration. This was what his Lordship Raja Azlan Shah J (as he then was) had to say in the case of *Mooney & Ors v. Peat, Marwick, Michell & Company & Anor* [1967] 1 MLJ 87 at p. 88:

> It is firmly established that the power exercisable under r. 4 (a precursor of the present O. 18 r. 19) "is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for": see the judgment of Lindley MR in *Hubbuck & Sons v. Wilkinson, Heywood & Clark*

Ltd [1899] 1 QB 86, 91. Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any suitable case can be made for this application: see *Peck v. Russell* [1923] 4 FMS LR 32, 34. The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out: see *Boaler v. Holder* [1886] 54 LT 298.

Findings

(a) Has The Plaintiff Any Cause Of Action?

As may be seen from the statement of claim the plaintiff is basically complaining that the police did not take any action on the several police reports lodged by him and a few others. There is also an allegation of an abuse of powers on the part of the police towards the plaintiff. In consequence thereof the plaintiff is alleging that he suffered loss and damage. Hence, the first question to ask is: was the conduct of the police as alleged and if indeed true, actionable in law?

The learned Senior Federal Counsel abandoned her contention on the issue of 'non-justiciable'. But that I think should not prevent me from considering the question as posed. The answer of course is whether there is in fact a statutory duty or only a discretionary statutory power upon the police to conduct investigation on any report lodged. If it is the former limb then there is no doubt that an action will lie as "where a statute confers power coupled with a **duty** to exercise it, failure to do so is a breach of that duty for which a remedy will lie". However, it should also be remembered, although not really relevant at this stage, that having a cause of action is one thing and proving it is another. To establish civil liability for a breach of statutory duty it is necessary to show that "(a) the injury he has suffered is within the ambit of the statute, (b) the statutory duty imposes a liability to civil action, (c) the statutory duty was not fulfilled, and (d) the breach of duty has caused his injury". (see: *Hu Sepang's* case *(supra)*).

If it is the latter limb then the element of malicious refusal must be alleged and proved in order to succeed for compensation. After all the principle is that "where the loss is occasioned by failure to exercise a power coupled with a **discretion** there is no liability ... But a plaintiff is still entitled to compensation if he can prove that there had been malicious refusal to exercise a discretionary statutory power." (see: *Hu Sepang v. Keong On Eng & Ors (supra)*).

And to determine which of the above limbs is applicable in the present case it is necessary to consider the relevant statute or statutes. There are provisions in the Criminal Procedure Code (FMS Cap. 6) relating to information and investigation by the Police. They are as follows:

107. Information

(1) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.

(2) Every such information shall be entered in a book to be kept by such officer, who shall append to such entry the date and hour on which such information was given, and whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it.

108. Procedure

(1) **When the information aforesaid relates to the commission of a non-seizable offence such officer shall refer the informant to a Magistrate.**

(2) **No police officer shall in a non-seizable case exercise any of the special powers in relation to police investigations given by this Chapter without the order of the Public Prosecutor.**

(3) Any police officer not below the rank of Sergeant or any officer in charge of a police station receiving such order may exercise the same powers in respect of the investigation except the power to arrest without warrant, as such police officer may exercise without an order in seizable case. (emphasis added).

109. Investigation in seizable cases

(1) Any police officer not below the rank of Sergeant or any officer in charge of a police station may without the order of the Public Prosecutor exercise all or any of the special powers in relation to police investigations given by this Chapter in any seizable case.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one in which such officer was not empowered under this section to exercise the special powers of police investigations given by this Chapter.

110. Procedure where seizable offence suspected

(1) If from information received or otherwise a police officer not below the rank of Sergeant or an officer in charge of a police station has reason to suspect the commission of a seizable offence he shall, unless the offence be of a character which the Public Prosecutor has directed need not be reported to him, forthwith send a report of the same to the Public Prosecutor, and shall proceed in person or shall depute one of his subordinate officers to proceed to the spot to inquire into the facts and circumstances of the case and to take such measures as may be necessary for the discovery and, where not inexpedient, arrest of the offender:

Provided as follows –

(a) when any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature the police officer receiving the same need not proceed in person or depute a subordinate officer to make an enquiry on the spot;

(b) *if it appears to the police officer receiving the information that there is no sufficient ground for proceeding or further proceeding in the matter he shall not do so.*

(2) *In each of the cases mentioned in paragraphs (a) and (b) the police officer receiving the information shall state in his said report (if any) his reasons for not fully complying with subsection (1).*

(3) Where a police officer exercises the power of deputation given by subsection (1) the subordinate officer so deputed shall not be entitled to use any of the powers given by sections 111, 112, 116 and 117. (emphasis is mine).

Hence, as can be noted from those sections that indeed the police have a role to play in the event of an information pertaining to a crime is lodged. For a non-seizable offence the police is expected to refer the matter to a magistrate or obtain an order from the Public Prosecutor before commencing an investigation. As for a seizable offence it is clear what is expected from the police.

Now, there is no indication or assertion from the police in any form before me that steps have been taken as regards the police reports referred to by the plaintiff in his statement of claim. Accordingly, based on the allegations of the plaintiff, which for the purpose of this application may be assumed as true, it cannot be said that there is no cause of action disclosed in the statement of claim. No doubt it is a question of law whether or not the police are statutorily obliged or that it is a matter of absolute discretion in respect of investigation on report lodged. But that aside I think the provisions of the law expect some form of action to be taken by the police when a report is lodged. Even if a decision is made not to launch an investigation the least the police are expected to do is to say so and the reason thereto. In this case there is no assertion from the police to that effect. As such I think a full hearing of this case should be held. That will allow oral evidence to be adduced in court as to what actions were taken pertaining to the reports lodged. In short I find that there are triable issues in this case and it is not a plain and obvious case that should be dismissed summarily. In fact the allegation on the conduct of the police personnel towards the plaintiff and his workers by itself would not allow me to strike out this action in limine. Thus, the first ground relied upon by the defendants must necessarily fail. And hence the answer to the above question is therefore in the affirmative.

(b) Is The Action Frivolous, Vexatious Or An Abuse Of The Process Of The Court?

In view of what I have stated earlier I think the answer to the above question is obviously in the negative. In fact I find that the defendants did not aver in any manner that the police did take some form of action in compliance with the provisions of the Criminal Procedure Code. Perhaps too much reliance has been placed on the assertion that investigation on a police report lodged is a matter of absolute discretion. With respect the provisions of the laws should be attended to and not based on assumption or belief. And I do not think that it is the manner of investigation by the police that the plaintiff is complaining. It is mainly on the alleged failure of the police to take any form of action or do anything on the police reports lodged. As such the issue of public policy and the apprehension of avalanches of suits would be filed is not material at this stage.

Accordingly these grounds also fail.

(c) Malafide And Declaratory Order

Having considered the submission advanced for these grounds with respect I am not persuaded that these are sufficient to strike out this action summarily. The plaintiff has made such allegation of bad faith on the part of the police and it is for him to substantiate it during a full hearing of the case. As for the issue of declaratory order being discretionary and only based on legal or equitable rights I think my foregoing discussions and conclusions on the other grounds relied upon should indicate the answer. Therefore these two grounds also fail.

Conclusion

I have also considered the other points raised by the respective learned counsel for the parties. I do not think they have made any material impact upon the conclusion that I have come to. Hence, for the above reasons I therefore dismiss this application with costs to be taxed unless agreed. I also order that the parties proceed to set down this case for trial as soon as possible.